

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

RONALD MAZZAFERRO, pro se,

Petitioner,

vs.

UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE, and
MARY C. ROWLAND, Revenue Agent,

Respondents.

Case No: C 10-80156-MISC SBA

**ORDER GRANTING
RESPONDENTS' MOTION
TO DISMISS PETITION
AND MOTION FOR SUMMARY
ENFORCEMENT**

Petitioner Ronald Mazzaferro filed a pro se petition to quash a summons issued by the Internal Revenue Service ("IRS") to obtain records from Exchange Bank in Santa Rosa, California. The IRS answered the petition and filed a combined motion to dismiss the petition and motion for summary enforcement of the summons. Dkt. 1, 3.¹ Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby DENIES the petition and GRANTS the IRS' motion to enforce the summons. The Court, in its discretion, finds this matter suitable for resolution without oral argument. See Fed.R.Civ.P. 78(b); Civ. L.R. 7-1(b).

BACKGROUND

IRS Revenue Agent Mary Rowland ("Agent Rowland") was assigned to investigate the tax liabilities of the Petitioner. Rowland Decl. ¶ 2, Dkt. 4. On or about July 1, 2010, Agent Rowland issued a third party summons to Exchange Bank in order to obtain information regarding Petitioner for the time period from December 31, 1999, through June 30, 2010. *Id.* ¶ 9 & Ex. A. The summons seeks information regarding "whether certain

¹ The petition identifies the United States of America, the Internal Revenue Service and Revenue Agent Mary C. Rowland as Respondents. For simplicity, Respondents will be collectively identified as the "IRS."

1 checks made payable, endorsed, and deposited to an account at Exchange Bank were
2 indicative of unreported taxable income.” Id. ¶ 3. The summons was sent by certified mail
3 to Exchange Bank and Petitioner on July 1, 2010. Id. ¶ 9. The summons indicated that the
4 deadline for producing the requested records was July 23, 2010. Id. Ex. A. However, none
5 of the requested items have been produced. Id. ¶ 9.

6 On July 21, 2010, Petitioner filed the instant petition, which alleges the following
7 claims: (1) the IRS failed to provide him with the notice required by 26 U.S.C.
8 § 7609(a)(1); (2) that the IRS failed to provide him with advance notice and periodic
9 updates as required by 26 U.S.C. § 7602(c)(1) & (2); (3) the summons was issued while a
10 referral for criminal prosecution was pending in violation of 26 U.S.C. § 7602(d)(2)(A);
11 (4) the IRS’ use of Form 2039 was an abuse of process because Exchange Bank is not a
12 third party record-keeper; (5) the IRS failed to meet the “good faith” requirements of
13 United States v. Powell, 379 U.S. 48 (1964); (6) the IRS is in violation of “the Privacy
14 Laws of the United States of America”; and (7) the IRS is in violation of California privacy
15 laws. Petition at 3-5, Dkt. 1.

16 In response to the petition, the IRS filed an answer on September 23, 2010. Dkt. 2.
17 On October 12, 2010, the IRS filed a motion to dismiss and for an order to enforce the
18 summons. Dkt. 3. The motion is supported by the declaration of Agent Rowland. Id. As a
19 threshold matter, the IRS argues that the Court lacks subject matter jurisdiction to consider
20 the petition on the ground that Petitioner failed to properly serve the IRS with the petition
21 and failed to obtain issuance of a summons. Additionally, the IRS seeks to enforce the
22 summons based on its compliance with the requirements articulated by the Supreme Court
23 in Powell.

24 The hearing on the petition and the IRS’ motion was originally scheduled for
25 December 14, 2010. Under Civil Local Rule 7-3(a), any opposition to the IRS’ motion was
26 due within twenty-one days of the hearing date, meaning that Petitioner’s response was due
27 by November 23, 2010. No opposition was received by that date. Instead, on December 2,
28 2010, after the filing deadline had passed, Petitioner filed a request to vacate the December

1 14 hearing date on the ground that he was never served with the IRS' motion papers. Dkt.
2 6. Although it appeared that Petitioner had, in fact, received the motion, the proof of
3 service accompanying the motion papers was unsigned. Out of an abundance of caution,
4 the Court granted Petitioner's request and ordered the IRS to re-serve its motion papers and
5 to e-file a Certificate of Service. 12/7/10 Order, Dkt. 7. On December 7, 2010, the same
6 date that the Court issued the above-referenced Order, the IRS filed a Certificate of Service
7 evidencing that it served, by first class mail, its motion to dismiss and the supporting
8 declaration at the address listed on Petitioner's court filings. Dkt. 8.

9 The Court's 12/7/10 Order instructed Petitioner to file and serve his opposition or
10 statement of non-opposition to IRS' motion by no later than December 23, 2010. Id. The
11 Order explicitly warned that the failure to timely respond to the motion would result in the
12 granting of the IRS' motion. Id. The Court continued the hearing on the motion from
13 December 14, 2010, to February 8, 2011. Nonetheless, Petitioner did not file an opposition
14 or statement of non-opposition, as ordered. Instead, on December 22, 2010, a day before
15 his response to the motion was due, Petitioner filed a declaration in which he requested that
16 the Court vacate the December 23, 2010 deadline to file a response to IRS' motion, and to
17 vacate the February 8, 2011 hearing date. Mazzaferro Decl. ¶ 11, Dkt. 9. The Court
18 liberally construes Petitioner's declaration as a motion for continuance.²

19 In his motion, Petitioner now claims that on December 21, 2010, after reviewing the
20 Court's December 7, 2010 Order, he accessed the Court's PACER service, but allegedly
21 was unable to find proof that he had been served with the IRS' motion papers. Id. ¶ 11.
22 Petitioner alleges that he has not received the IRS' motion papers and that he is "very

23 _____
24 ² On February 1, 2011, Petitioner filed a second "declaration," apparently in
25 connection with the IRS' motion. Dkt. 11. The Court's scheduling order issued on
26 December 7, 2010, expressly states that the Court "will not consider any papers filed by
27 Petitioner after [December 23, 2010]", the deadline for his opposition or statement of non-
28 opposition. 12/7/10 Order at 2. Since Petitioner filed the aforementioned declaration
without seeking or obtaining leave of Court to do so, the Court strikes the declaration from
the record. Nonetheless, the Court notes that nothing in the declaration alters the Court's
analysis and conclusions in this Order.

1 confused as to what should be done or responded to at this point and therefore respectfully
 2 object [sic] to having to respond in this state of confusion caused by Respondent's failure to
 3 comply with the December 7, 2010 order of the Court and or [sic] to file and serve
 4 documents it lists on its various proofs of service." Id. ¶ 12. As will be set forth below,
 5 however, the Court finds that Petitioner's assertion that he has not received the IRS' papers
 6 lacks credibility and that he otherwise has failed to demonstrate good cause for vacating the
 7 deadline for his opposition or the hearing date scheduled for February 8, 2011. As a result,
 8 the Court deems the IRS' motion to dismiss and to enforce summons ripe for adjudication
 9 without further delay.³

10 DISCUSSION

11 **I. PETITIONER'S MOTION FOR CONTINUANCE**

12 A trial court has broad discretion in ruling on a motion for a continuance. Ungar v.
 13 Sarafite, 376 U.S. 575, 589 (1964); United States v. Moreland, 604 F.3d 1058, 1069 (9th
 14 Cir. 2010). In this District, a party may seek leave to modify a filing deadline or date for a
 15 court appearance set pursuant to a prior court order by submitting a stipulation under Civil
 16 Local Rule 6-2. If the opposing party is unable to obtain a stipulation, the party seeking the
 17 continuance must file a motion to change time in accordance with Local Rule 6-3.

18 A motion made under Local Rule 6-3 must: (1) set forth with particularity the reasons for
 19 the requested time change; (2) describe the efforts to obtain a stipulation for a time change;
 20 (3) identify the "substantial harm or prejudice" that would result absent a time change;
 21 (4) disclose all prior time modifications; and (5) describe the effect the requested
 22 modification would have on the schedule for the case. Id. 6-3(a).

23 Petitioner's motion, which the Court has liberally construed, does not comply with
 24 the requirements of Local Rule 6-3. A request that fails to comport with procedures set
 25

26 ³ As will be set forth below, the petition is subject to dismissal for lack of
 27 jurisdiction. Alternatively, the petition may be dismissed based on Petitioner's failure to
 28 file any substantive response to the United States' motion. See Ghazali v. Moran, 46 F.3d
 52, 53 (9th Cir. 1995) (per curiam); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir.
 1992).

1 forth in a district court's local rules may be summarily denied. See Grove v. Wells Fargo
2 Fin. Cal., Inc., 606 F.3d 577, 582 (9th Cir. 2010) (upholding district court's denial of
3 motion to tax costs which was not in compliance with the court's local rules). The fact that
4 Petitioner is pro se does not insulate him from the responsibility of complying with all
5 applicable procedural rules and orders of this Court. See Ghazali, 46 F.3d at 54 ("pro se
6 litigants are bound by the rules of procedure") (per curiam); Swimmer v. I.R.S., 811 F.2d
7 1343, 1344 (9th Cir. 1987) ("[i]gnorance of court rules does not constitute excusable
8 neglect, even if the litigant appears pro se.").

9 Setting aside Petitioner's non-compliance with the Local Rules, the Court finds that
10 he has failed to demonstrate good cause for his request. Petitioner's claim that he has not
11 received copies of the IRS' motion is specious and incredible. The IRS re-served its
12 motion papers on Petitioner at the address that appears on Petitioner's submissions to this
13 Court. In addition, Petitioner's claim that he has not received the IRS' motion is belied by
14 the fact that he quotes directly from the IRS' motion. Mazzaferro Decl. ¶ 5. In addition,
15 even if he did not receive the motion papers by mail, Petitioner was on notice that the
16 failure to file a response to the IRS' motion by the stated deadline would have dire
17 consequences for him. As such, Petitioner easily could have downloaded copies of the
18 IRS' motion papers when he accessed PACER on December 17, 2010.⁴

19 As for Petitioner's claim of "confusion," the Court's 12/7/10 Order, which Petitioner
20 admits he received, clearly states that he must file an opposition or statement of non-
21 opposition by no later than December 23, 2010. 12/7/10 Order at 3.⁵ The Order also
22 warned Petitioner of the consequences of failing to respond to the IRS' motion; namely,
23 that the motion would be granted. Id. Petitioner's request for a continuance is nothing

24 _____
25 ⁴ In addition, the Clerks Office has computers available to the public from which
26 documents in PACER can be accessed and printed. Thus, even if Petitioner did not receive
the motion papers from the IRS in the mail, he had the ability to obtain copies of the motion
through the Court.

27 ⁵ Petitioner's ancillary assertion that as of December 21, 2010, he was unable to find
28 proof in PACER that he had been served is equally specious. The PACER docket confirms
that IRS e-filed its Certificate of Service on December 7, 2010.

1 more than a dilatory tactic intended to delay resolution of this matter. See United States v.
2 Kelm, 827 F.2d 1319, 1322 (9th Cir. 1987) (recognizing that a trial court may properly
3 deny a continuance if the requesting party's conduct is "dilatory and hinders the efficient
4 administration of justice"), overruled on other grounds by United States v. Heredia, 483
5 F.3d 913, 920 (9th Cir. 2007) (en banc). Accordingly, Petitioner's motion for a
6 continuance is denied. The Court now turns to the merits of the IRS' motion to dismiss.

7 **II. PETITION TO QUASH**

8 **A. Overview**

9 Under the Internal Revenue Code ("IRC"), the IRS is authorized to issue a summons
10 relevant to the investigation of any taxpayer's liability. Summons may be issued for the
11 purposes of "ascertaining the correctness of any return, making a return where none has
12 been made, determining the liability of any person for any internal revenue tax or ...
13 collecting any such liability." 26 U.S.C. § 7602(a). A taxpayer identified in an IRS
14 summons served on a third-party record keeper may begin proceedings to quash the
15 summons. 26 U.S.C. § 7609(b)(2)(A). In turn, the IRS may seek to compel compliance
16 with the summons. Id.; Crystal v. United States, 172 F.3d 1141, 1143 (9th Cir. 1999).

17 "To defeat a petition to quash, or to enforce a summons, the government must
18 establish that (1) the investigation will be conducted for a legitimate purpose; (2) the
19 material being sought is relevant to that purpose; (3) the information sought is not already
20 in the IRS's possession; and (4) the IRS complied with all the administrative steps required
21 by the Internal Revenue Code." Crystal, 172 F.3d at 1143-44 (citing Powell, 379 U.S. at
22 57-58). The IRS' burden to establish the prima facie case "is a slight one, and may be
23 satisfied by a declaration from the investigating agent that the Powell requirements have
24 been met." United States v. Dynavac, Inc., 6 F.3d 1407, 1414 (9th Cir. 1993). "The burden
25 is minimal because the statute must be read broadly in order to ensure that the enforcement
26 powers of the IRS are not unduly restricted." Id.

27 Once the IRS establishes a prima facie case under Powell, the burden shifts to the
28 petitioner to negate one of the four Powell elements or demonstrate a lack of good faith on

1 the part of the Government. Dynavac, Inc., 6 F.3d at 1414. “The taxpayer ... carries a
2 heavy burden.” United States v. Stuckey, 646 F.2d 1369, 1372 (9th Cir. 1981). “The
3 taxpayer must allege specific facts and evidence to support his allegations of bad faith or
4 improper purpose.” Crystal, 172 F.3d at 1144. “If no substantial challenge to the validity
5 of the summons is made in a sworn affidavit or declaration alleging specific facts, the
6 matter should be decided on the pleadings before the district court with no further
7 proceedings.” Strough v. United States, 326 F. Supp. 2d 1118, 1121 (C.D. Cal. 2003)
8 (citing Liberty Fin. Servs. v. United States, 778 F.2d 1390, 1392-93 (9th Cir. 1985)).

9 **B. Subject Matter Jurisdiction**

10 The threshold question is whether the Court has subject matter jurisdiction to
11 consider the petition. As a general rule, the United States may not be sued unless it has
12 waived its sovereign immunity. Bramwell v. U.S. Bureau of Prisons, 348 F.3d 804, 806
13 (9th Cir. 2003). Unless the United States consents to be sued, the Court lacks subject
14 matter jurisdiction over claims against the federal government. United States v. Sherwood,
15 312 U.S. 584, 586 (1941); McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1998).
16 In limited circumstances, § 7609 of the IRC waives sovereign immunity for a judicial
17 review of IRS summonses. 26 U.S.C. § 7609(a), (b)(2)(A). Congress provided that “any
18 person who is entitled to notice of a summons under subsection (a) shall have the right to
19 begin a proceeding to quash such summons not later than the 20th day after the day such
20 notice is given in the manner provided in subsection (a)(2).” 26 U.S.C. § 7609(b)(2)(A).

21 As the party seeking to invoke this Court’s jurisdiction, Petitioner bears the burden
22 of demonstrating that he has standing in this case. See Lujan v. Defenders of Wildlife, 504
23 U.S. 555, 560 (1992). Petitioner has failed to meet that burden. To properly commence a
24 proceeding to quash a summons, the taxpayer must, within twenty days of receiving notice
25 of the summons, send by registered or certified mail, a copy of the petition to the person
26 summoned and to the IRS. 26 U.S.C. § 7609(b)(2)(B). In this case, there is no evidence
27 that Petitioner served a copy of his petition on Exchange Bank. Nor is there any evidence
28 that Petitioner properly served the IRS by registered or certified mail and included a

1 summons. See Fed. R. Civ. 4(i). In addition, the U.S. Attorney's Office has no record of
2 receiving a copy of these documents. Since compliance with § 7609 is jurisdictional,
3 Petitioner's failure to abide by its requirements warrants dismissal of the instant petition.
4 See Ponsford v. United States, 771 F.2d 1305, 1309 (9th Cir. 1985) (affirming district
5 court's refusal to review IRS summonses where taxpayer failed to comply with the twenty-
6 day filing requirement of § 7609(b)(2)(A)).

7 **C. Enforcement of the Summons**

8 Even if Petitioner had complied with the jurisdictional requirements of
9 § 7609(b)(2)(A), the Court finds, as an alternative matter, that the petition would be denied
10 in any event. As discussed, a petition to quash and motion to enforce summons rely on the
11 same analytical framework: The IRS must make an initial showing under Powell, and if it
12 does so, the petitioner must negate one of the Powell elements or demonstrate a lack of
13 good faith on the part of the IRS. Dynavac, Inc., 6 F.3d at 1414.

14 **1. Legitimate Purpose**

15 The first Powell element requires the IRS to demonstrate that its investigation is
16 being conducted for a legitimate purpose. 379 U.S. at 57. According to the declaration of
17 Agent Rowland, the purpose of the summons is to ascertain "whether certain checks made
18 payable, endorsed, and deposited to an account at Exchange Bank were indicative of
19 unreported taxable income." Rowland Decl. ¶ 3. This is a legitimate purpose for an IRS
20 summons. See Wild v. IRS, 362 F.2d 206, 209 (9th Cir. 1966) ("If . . . the objective of the
21 investigation is to obtain information which may be utilized in determining whether there is
22 civil liability for a tax . . . then the summons may be enforced"); Nelson v. IRS, No. C 94-
23 1345 FMS, 1994 WL 519485, at *6 (N.D. Cal. Sept. 19, 1994) ("Respondents issued the
24 summons to ascertain whether petitioners' tax returns correctly reflected their income. This
25 is a legitimate purpose.") (Smith, J.).

26 **2. Relevance**

27 The second prong under Powell requires the IRS' inquiry to be relevant to the
28 legitimate purpose. 379 U.S. at 57. "The IRS' power to examine records in connection

1 with tax investigations is broadly construed.” IRS v. Zolin, 809 F.2d 1411, 1414 (9th Cir.
2 1987), aff’d in part and vac’d in part on other grounds, 109 S.Ct. 2618 (1989). “The IRS’s
3 burden, while not great, is also not non-existent.” IRS v. Goldman, 637 F.2d 664, 667 (9th
4 Cir. 1980). If the records “might throw light” on the accuracy of the returns, then they are
5 relevant. Zolin, 809 F.2d at 1414.

6 The IRS contends that the records sought by the summons “are relevant to and can
7 reasonably be expected to assist in inquiry regarding the tax obligations” of the Petitioner.
8 Rowland Decl. ¶ 5. In particular, the IRS seeks copies of checks deposited into Petitioner’s
9 account that should have been reported as taxable income. Id. ¶ 3. As such, the records
10 being sought are clearly relevant. See English v. Krubsack, 371 F. Supp. 2d 1198, 1202
11 (E.D. Cal. 2005) (finding that that summoned financial records related to taxpayer’s
12 financial activity and were relevant and necessary to determine taxpayer’s income tax
13 liabilities); see also Personett v. I.R.S., No. 09-cv-01258-PAB-KMT, 2009 WL 3417863, at
14 *6 (D. Colo. Sept. 3, 2009) (finding the relevance requirement satisfied because financial
15 records are certain to aid in examining income tax liability).

16 **3. Possession of Information**

17 The third Powell requirement is that the “information sought is not already within
18 the Commissioner’s possession.” 379 U.S. at 57-58. Agent Rowland states in her
19 declaration that the IRS does not have access, possession or control over the records being
20 sought. Rowland Decl. ¶ 4. This statement is sufficient to satisfy the IRS’s burden. See
21 Dynavac, 6 F.3d at 1414 (“The government’s burden ... may be satisfied by a declaration
22 from the investigating agent that the Powell requirements have been met.”).

23 **4. Compliance with Administrative Steps**

24 The final Powell element requires the IRS to show that it has followed the IRC’s
25 administrative steps. 379 U.S. at 58. Although Petitioner has not filed an opposition that
26 substantively addresses the IRS’ motion to dismiss, the Court liberally construes the
27 petition to assess whether the IRS followed with the requisite administrative procedures.
28

1 As discussed below, the Court finds that the IRS has done so, and that Petitioner's claims to
2 the contrary are without merit.

3 *a) 26 U.S.C. § 7609(a)(1)*

4 Petitioner first alleges that the IRS failed to provide twenty-three days notice for
5 compliance with the summons, as required by 26 U.S.C. § 7609(a)(1). Petition at 3. The
6 IRS concedes that due to an inadvertent error, it provided Petitioner with twenty-two, as
7 opposed to twenty-three, days to comply. Rowland Decl. ¶ 10. Nonetheless, the IRS
8 contends that such error does not invalidate the summons, particularly where, as here,
9 Petitioner has suffered no demonstrable prejudice as a result.

10 Though the Ninth Circuit has not yet reached this issue, circuit courts have held that
11 an error in the administrative process does not per se invalidate the summons. See IRS v.
12 Gilbert C. Swanson Found., Inc., 772 F.2d 440, 441 (8th Cir. 1985) (“[W]e believe denial
13 of the summons would be an elevation of form over substance”); Adamowicz v. IRS, 531
14 F.3d 151, 161 (2d Cir. 2008) (“[W]e adopt the rule that whether the government's violation
15 of the IRC or an IRS regulation in connection with the issuance of a summons affects the
16 enforceability of that summons depends upon the totality of the circumstances, including
17 the seriousness of the infringement, the harm or prejudice, if any, caused thereby, and the
18 government's good faith”); Cook v. IRS, 104 F.3d 886, 889 (6th Cir. 1997) (employing a
19 harmless error type analysis to conclude that a one-day-late notice did not warrant quashing
20 the summons); Sylvestre v. IRS, 978 F.2d 25, 28 (1st Cir. 1992) (holding untimely notice
21 was not a basis for quashing the summons where [the taxpayer] was not harmed by the late
22 notice) (per curiam); IRS v. Bank of Moulton, 614 F.2d 1063, 1066 (5th Cir. 1980) (“We,
23 too, decline to elevate form over substance and reject the suggestion that every
24 infringement of a requirement of the [IRC] absolutely precludes enforcement of an IRS
25 summons”).

26 Federal district courts within the Ninth Circuit are in accord. See Int'l. Bus. Enters.
27 v. IRS, No. 95-95, 1995 WL 381626, at *3 (S.D. Cal. Mar. 30, 1995) (“[T]he sufficiency of
28 notice should be analyzed by evaluating the good faith of the IRS agent and by analyzing

whether there is injury to the taxpayer.”); Simmons v. IRS, No. CV F-94-5500 OWW DLB, 1994 WL 16193779 (E.D. Cal. Dec. 2, 1994) (denying petitioner’s motion to quash summons despite the fact that Agent Weaver misdated the face of the summons since the summons was issued and served); Fin. Sec. Corp. v. IRS, No. C 84-4268 MHP, 1984 WL 3127, at *2 (N.D. Cal. Dec. 6, 1984) (holding that despite the disputed technical sufficiency of the notice, petitioners were not prejudiced and thus the matter should be resolved on the merits) (Patel, J.); Vincent v. IRS, No. Cv. F. 84-85 EDP, 1984 WL 3116, at *3 (E.D. Cal. Nov. 15, 1984) (denying motion to quash summons despite the technical violation of Section 2609(d)).

Here, the summons was dated June 30, 2010, but apparently due to an inadvertent administrative error, the IRS did not mail the summons until July 1, 2010. Rowland Decl. ¶ 10. Although taxpayers are afforded twenty-three days notice per § 7609(a)(1) to respond, the summons incorrectly specified the deadline to respond as July 23, 2010. Id. Based on a service date of July 1, 2010, Petitioner thus received only twenty-two, as opposed to twenty-three, days notice. Petitioner asserts in his petition that the IRS’ error precluded him from timely filing his petition to quash the summons. Petition ¶ 10. This contention lacks merit. A taxpayer has twenty days from the date the summons is served to file such a petition. 26 U.S.C. § 2602(b)(2). Since the summons was served on July 1, 2010, Petitioner had until July 21, 2010 to file a petition to quash the summons—which is precisely when the petition was filed. Dkt. 1. Accordingly, Petitioner’s claim that he was prevented from timely filing his petition is without merit.

b) 26 U.S.C. § 7602(c)

Equally without merit are Petitioner’s assertions that the IRS violated 26 U.S.C. § 7602(c)(1) and (c)(2) by failing to provide him with: “advance notice that contact with any of these third parties were to be made; and failed to periodically provide Mazzaferro with a record of persons contacted by [the] IRS about Mazzaferro as required[.]” Petition ¶ 11. Section 7602(c) states:

Notice of contact of third parties

(1) General notice—An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.

(2) Notice of specific contacts—The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.

26 U.S.C. § 7602.

In the instant case, the record shows that the IRS attempted to contact Petitioner regarding the summons by mailing him an initial contact letter and a pamphlet titled “Your Rights as a Taxpayer.” Rowland Decl. ¶ 6. The letter was sent by certified mail and addressed to Petitioner’s last known mailing address, id., but was returned because there was no mail receptacle at that address. Id. ¶ 7. The IRS later served the IRS summons on Exchange Bank and gave notice to Petitioner by certified mail on July 1, 2010, two months after it attempted to provide notice to Petitioner. Id. ¶ 9. Though Petitioner did not actually receive the notice when it was originally sent, the United States nonetheless satisfied its obligation to provide advance notice by mailing it to Petitioner’s last known address. See 26 U.S.C. § 7602(a)(2) (“If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice[.]”).⁶ The United States also complied with § 7602(c)(2) by providing Petitioner with a record of persons whom had been contacted. See Rowland Decl. Ex. A.

c) 26 U.S.C. § 7602(d)(2)(A)

Under 26 U.S.C. § 7602(d), the IRS cannot issue nor seek to enforce an administrative summons “if a Justice Department referral is in effect with respect to such person.” Petitioner alleges that “the IRS Summons was issued while a referral for criminal

⁶ On April 23, 2010, the United States was able to trace Petitioner’s address to P.O. Box 147, El Verano, CA 94533, which is the same address listed on the various papers Petitioner has filed with this Court. Id. ¶ 8. It is unclear why the IRS did not send notice of the summons to Petitioner at this address until July 1, 2010. Nevertheless, as set forth above, the uncontroverted records shows that the United States discharged its obligations under § 7602(c)(1) through the earlier mailing.

1 prosecution to the Department of Justice is pending, which was made by the IRS in
2 violation of Section 7602(a)(2)(A).” Petition ¶ 12. However, no such referral had been
3 made to the Department of Justice. Rowland Decl. ¶ 12. As such, the Court finds no
4 factual basis to support Petitioner’s allegation that the United States violated
5 § 7602(d)(2)(A).

6 *d) Form 2039*

7 Petitioner next alleges that the United States improperly served Exchange Bank with
8 a Form 2039 summons, based on the theory that “Exchange Bank is not a third party record
9 keeper pursuant to Section 7603(b)(2)(1) [sic].” Petition ¶ 13. Form 2039 is a general
10 summons form utilized by the IRS. See Poole v. United States, No. C 10-2668 RS, 2011
11 WL 206674, at *3 (N.D. Cal. Jan. 21, 2011). Section 7603(b) defines a “third-party record
12 keeper” as “any mutual savings bank, cooperative bank, domestic building and loan
13 association, or other savings institution chartered and supervised as a savings and loan or
14 similar association under Federal or State law, *any bank (as defined in section 581)*, or any
15 credit union (within the meaning of section 501(c)(14)(A))[.]” 26 U.S.C. § 7603(b)
16 (emphasis added).

17 Petitioner has provided the Court with no legal authority for the proposition that
18 Form 2039 is limited to third party record keepers. But even if the use of Form 2039 were
19 limited in that manner, the IRS’ use of the form in this instance was proper. Under 26
20 U.S.C. § 581, “the term ‘bank’ means a bank or trust company incorporated and doing
21 business under the laws of the United States ...or of any State....” 26 U.S.C. § 581.
22 The Court takes judicial notice of the fact that Exchange Bank is listed on the
23 Federal Deposit Insurance Corporation’s website as a “state chartered bank....” See
24 http://www2.fdic.gov/idasp/main_bankfind.asp (last visited Feb. 1, 2011). In addition, the
25 Court has been provided with no evidence that Exchange Bank is, in fact, not a bank.
26 Therefore, even if Form 2039 were limited to third party record-keepers, the Court finds
27 that the IRS’ use of the form was proper in this instance.
28

1 **III. CONCLUSION**

2 The Court finds that the IRS has met its burden of showing that all of the elements
3 of the Powell test have been satisfied. In contrast, Petitioner has not met his burden of
4 showing an abuse of process or lack of good faith on the part of the IRS. Accordingly,

5 IT IS HEREBY ORDERED THAT:

6 1. The IRS' motion to dismiss the petition and for summary enforcement of the
7 summons is GRANTED. The petition is dismissed and the summons shall be enforced
8 forthwith.


9 2. Docket 11 (Declaration of Petitioner Ronald Mazzaferro) is STRICKEN.

10 3. The hearing scheduled for February 8, 2011, is VACATED.

11 4. The Clerk shall close the file and terminate any pending matters.

12 IT IS SO ORDERED.

13 Dated: February 7, 2011


SAUNDRA BROWN ARMSTRONG
United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 RONALD MAZZAFERRO,

5 Plaintiff,

6 v.

7 UNITED STATES OF AMERICA et al,

8 Defendant.
9 _____/

10 Case Number: CV10-80186 SBA

11 **CERTIFICATE OF SERVICE**

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
13 Court, Northern District of California.

14 That on February 8, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said
15 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing
16 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
17 located in the Clerk's office.

18 Ronald Mazzaferro
19 P.O. Box 536
20 El Verano, CA 95433

21 Dated: February 8, 2011

Richard W. Wieking, Clerk

22 By: LISA R CLARK, Deputy Clerk
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